In the Supreme Court of the United States.

ROBERT L. WINEBRENNER, APPELLANT,	No. 409.
v.	Oct. Term,
EDWARD C. FORNEY, APPELLEE.	1902.

Statement of Facts.

This action was originally commenced in the district court of Kay County, Oklahoma Territory, by Robert L. Winebrenner against Edward C. Forney, for the recovery of title to the southwest quarter of section 19, township 26 north, range 1 east of the Indian Meridian, in Kay County, Oklahoma Territory. The case was disposed of in the trial court upon demurrer to the second amended petition of the plaintiff, which petition appears on pages 20 to 32 of the record. In substance, the plaintiff alleged that he was a native born citizen of the United States, and that prior to the opening of the Cherokee Outlet to settlement on September 16, 1893, he had never entered upon or occupied any portion of said Outlet, and was not then or at the time of filing said amended petition, the owner of one hundred and sixty acres of land in any other State or Territory. That prior to the opening of said Outlet he procured a booth certificate, entitling him to make homestead entry. That he was of proper age, the head of a family, and in all respects qualified at the time of the opening of said Outlet to enter and acquire title to a homestead therein. That at the time of the opening of said Outlet at noon on September

16, 1893, he entered upon said Outlet from the outer boundary thereof for the purpose of immediately securing and settling upon a homestead therein, and immediately after said opening he entered upon and occupied the quarter section of land above described, the same being a portion of the homestead lands opened to settlement on that day. That shortly after his entry upon said lands, he saw indications that it had been claimed and occupied by some one else, and he withdrew therefrom, but on the 22nd day of September, 1893, becoming satisfied that the land was not lawfully occupied, he returned thereto, and continued his improvements thereon, and has ever since occupied and improved the same in compliance with the homestead laws of the United States, except when excluded from said land, or portions thereof, by mandatory injunction orders of the district court of said county. That he placed a greater portion of said land in cultivation immediately after his said occupancy, and that the defendant, Forney, on the 23rd day of September filed homestead entry upon said land in the Land Office at Perry, O. T., and the defendant immediately thereafter tore down a portion of plantiff's fence, and entered into possession of a part of said land. That within three months after making said settlement, plantiff filed his contest against said homestead entry, claiming prior settlement upon said land, and setting forth that the defendant was disqualified to enter and acquire title to same, by reason of having entered upon the country known as the Cherokee Outlet prior to 12 o'clock, noon, Central Standard time, September 16, 1893, and by reason of his being within the outer boundaries of that country, which was prohibited at the time of the opening of lands in said Outlet to settlement, and at the hour of opening said lands to settlement the defendant was upon or near the western boundary of the Ponca Indian Reservation, and within the

country known as the Cherokee Outlet. That trial was had of said contest, and said contest was continued through all the departments and proceedings provided for contesting title to lands under the homestead laws of the United States, and copies of the decisions of the various departments are set forth as a part of said second amended petition. That as a result of said contest proceedings, the said land was unlawfully awarded to the said defendant, Forney. That the final proof of the said Forney for said land was accepted, and patent issued to him on the first day of October, 1900. That said patent was issued as a result of a misunderstanding and misapplication of the law by the officers of the Land Department and the Honorable Secretary of the Interior, with reference to the qualification of Forney to acquire title to the land, and that but for the mistakes and misapplication of the law on the part of the Land Department, the land would have been awarded, and patent issued, to this plaintiff, Winebrenner. That plaintiff tendered into court all costs and expenses laid out in acquiring said patent, and asked the Court to declare the said patent to be a title in trust for the benefit of the plaintiff and to decree a conveyance thereof to the plaintiff.

A demurrer was interposed to this second amended petition, and the same was sustained on the ground that the defendant Forney was not disqualified to hold and acquire title to land. The plaintiff declined to further plead, and the case was dismissed at the costs of the plaintiff, to all of which exceptions were taken, and an appeal prayed to the Supreme Court of the Territory. Record, pages 33 and 34.

On the 16th day of July, 1902, said judgment was affirmed by the Supreme Court of the Territory of Oklahoma. For the decision and opinion of said Supreme Court delivered and filed, see Record, pages 37 to 42.

On July, 18, 1902, an appeal was allowed to this Court, and by order of the Court the cause has been advanced to March 2, 1903.

The errors set forth in the appeal and relied upon herein are as follows:

First. That said Supreme Court erred in affirming the judgment of the District Court, and in not reversing the same as prayed for in the petition in error in said cause.

Second. That said Supreme Court erred in not reversing the judgment of said District Court sustaining the demurrer to the second amended petition of the plaintiff in error, and in not remanding said cause to said District Court with directions to overrule said demurrer.

Third. That said Supreme Court erred in not holding and deciding that the second amended petition of the plaintiff in error stated facts sufficient to require the cancellation of the patent of the defendant in error to the land in question.

Fourth. That said Supreme Court erred in holding and deciding that the defendant in error was not disqualified to to hold and acquire title to the land in question by prior settlement thereon, by reason of his having entered upon said land immediately after twelve o'clock, noon, September 16, 1893, from the Ponca Indian Reservation in the country known as the Cherokee Outlet.

Fifth. That said Supreme Court erred in not holding and deciding that the defendant in error, Edward C. Forney, was and is disqualified to take and hold land in the Cherokee Outlet and the land in question, by virtue of prior settlement, by reason of his having entered upon said land from the Ponca Indian Reservation, and by reason of having been upon said Indian Reservation, within the country known as the Cherokee Outlet, prior to twelve o'clock, noon, September 16, 1893.

As we understand the case, the sole matter of contention between the parties is as to the disqualification of Forney, by reason of his being within the prohibited territory as set forth in the second amended petition, and as found by the Land Department. The facts with reference to the entry and all matters in dispute between the parties in the contest proceeding being finally determined by the findings of the Land Department, the single question to be decided is as to the law in relation to the qualification of the appellee.

Brief and Argument.

The Court will take judicial knowledge of the general conditions surrounding the opening of the lands in the country known as the Cherokee Outlet. Smith *v.* Townsend, 148 U. S., 490.

The statutes of the United States with reference to the opening of lands in the Cherokee Outlet to settlement are referred to and set forth in detail in the Proclamation of the President, promulgated August 19, 1893. The Proclamation also contained rules and regulations governing the opening of said lands, prepared by the Secretary of the Interior. Prior to the opening of these lands, several tracts had been opened in what is now called Oklahoma Territory, and some slight changes in the language of the act prohibiting entry upon the lands in the Cherokee Outlet, as well as rules and regulations promulgated by the Secretary of the Interior, are doubtless due to the intention and purpose to avoid controversies which had formerly arisen.

It had generally been considered practically impossible to exclude people from the lands to be opened to settlement until the hour of the opening. Persons who entered upon the lands in advance of the time fixed for the opening were called "sooners," and every possible effort was made in the opening of the lands in the Cherokee Outlet to exclude sooners therefrom. The requirements with reference to

procuring booth certificates were for that purpose. The Secretary of War directed that soldiers patrol the country to be occupied, and forcibly exclude therefrom all persons entering in violation of law. A great many inquiries were made of the office of the Secretary of the Interior, as well as other offices of the Government, with reference to the proper construction of the various provisions of the act of Congress and the proclamation of the President opening the lands in the Cherokee Outlet to settlement, thereby necessitating contemporaneous construction of the law, both before and immediately subsequent to the opening. Some inquiries were made with reference to the right of persons to enter within the outer boundaries of the land described in the Act of Congress and the Proclamation, and to go upon Indian Reservations situated within and upon the Cherokee Outlet. These inquiries, or some of them, were submitted to the Assistant Attorney-General, and his opinion, holding that such entry could not be made, was widely published throughout the country, and especially in the vicinity of the boundaries of the lands to be opened. Agents of the Government in charge of the opening were all directed to inform all persons that entry upon Indian Reservations was forbidden, and all persons were so informed. Not only were intending settlers warned that such an entry would forfeit their rights to acquire land, but they were forcibly ejected from the country, aud in many instances were arrested and placed in the guard-house;by the soldiers. In one instance, at least, an attempt to defy the authority of the soldiers with reference to the time and manner of entering upon these lands resulted in the killing of the intending settler by the regulars. That more instances of the kind did not occur is unquestionably due to the fact that other fool-hardy attempts to defy the soldiery were not made.

This construction of the law and the proclamation of the President prevailed for more than three years, and until

after a change was made in the office of the Secretary of the Interior.

The crowd of people that collected upon the borders of the country known as the Cherokee Outlet has been estimated by the Secretary of the Interior, through information gained from his deputies on the ground, at more than one hundred thousand, and the general estimate by those familiar with the situation, places the number at about 150,000.

A number of persons, being able to evade the vigilance of the soldiers and agents of the Government, secreted themselves along the Arkansas River and in various places upon Indian reservations in the Outlet, and either before or at the time of opening the lands to settlement entered from those points of advantage, and some of these persons settled upon and claimed rich lands along the Arkansas River as homesteads. Probably twenty, altogether, of these claims have been maintained in the Department. Few, if any, of these persons made substantial improvements upon the lands, but made merely slight improvements and continued to protect their claims in a colorable way until the change in the holding by the Secretary of the Interior gave them a substantial basis for their claim to the lands. We refer to these matters briefly, because we think that the contemporaneous construction of the law, both by the Secretary of the Interior and the Commissioner of the General Land Office, the President of the United States and the Secretary of War, the vast number of intending settlers and the lawyers of the country who were their advisers, is entitled to consideration. As to the importance of the rule of contemporaneous construction, see

United States *v.* State Bank of North Carolina, 6 Peters, 29–40;
United States *v.* Moore, 95 U. S., 767;
United States *v.* Johnson, 124 U. S., 236;
Pennoyer *v.* McConnaughey, 140 U. S., 1;
United States *v.* Alabama, etc., Ry. Co., 142 U. S., 615.

The leading case in the Land Department following the original construction of the law and the proclamation is that of Cagle *v.* Mendenhall. This decision, while giving much valuable information with reference to the construction of the law and the circumstances attending the opening, rather discusses some special proceedings on the part of the Secretary and his assistants, than the general nature of the act and the proclamation. Whatever the reasons given may be, we think the decision was correct, and should have been adhered to. The parties affected by the subsequent change of ruling were persons who had entered upon the land on the day of the opening, or immediately thereafter, and for more than three years had expended not only their money and labor upon the improvement of the land, but had gone to large expense in defending their titles to the same, and a return to that doctrine at this time can affect no one except the few parties who have been contending since the opening of this country to settlement There is no case now pending in the courts of Oklahoma other than those between original settlers and contestants, and no decision now rendered upon the subject could be the basis of future contests or new litigation. The rights of all parties interested stand to-day where they stood on September 16, 1893, except that those persons who observed the commands of the officers of the Government, and yielded willing obedience to its agents and soldiers, would not only be allowed the land which we conceive to be theirs in equity and justice, but would be saved many years of labor and expense laid out by them in improving and defending their homes.

For a general review of the questions under consideration, we refer to Cagle *v.* Mendenhall, 20 L. D., 440 ; Senate Executive Document No. 78, 51st Congress, first session, being a letter from the Secretary of the Interior transmitted in response to Senate resolution of March 10, 1890, a compila-

tion concerning the legal status of Indians in the Indian Territory; Report of the Secretary of War of his proceedings in connection with the opening of the Cherokee Outlet; Act of Congress approved March 3, 1893, 27 Stats. at Large, 640; Proclamation of the President, 17 L. D., 230; Brady *v.* Williams, 25 L. D., 55–402; 23 L. D., 533.

The holdings of the Land Department have been somewhat peculiar. Aside from the conflict between the cases of Brady *v.* Williams and Cagle *v.* Mendenhall, there appear to be some very important inconsistencies. On the forenoon of September 16, 1893, certain parties acting in conjunction with the agent in charge of the Chilocco Indian School, procured an order from the Commissioner's Office permitting persons to enter upon homestead lands from the Chilocco Indian School Reservation. The contemporaneous construction of the Act and the Proclamation appears in this request and the reply. The telegram to the Commissioner represented that great damage might be done to the property of the United States upon the Chilocco Reservation. A telegram from the Commissioner was returned in the nature of an order, directing that the one hundred foot reservation be placed around and south of the Chilocco Indian School Reservation. The authority of the Commissioner or the Land Department to make this modification of the Act of Congress and the Proclamation of the President was presented to the Land Department in the case of Welch *v.* Butler, 21 L. D., 369, but the point was not discussed in the case, and the history of the run from the Chilocco Indian School Reservation was not even referred to. It was merely held that the departmental order excluding persons from the Indian Reservations in the eastern portion of the Outlet had no application to the Chilocco Indian School Reservation, in effect assuming that the Chilocco Indian School Reservation was not within the prohibited

district, although it had been so considered at the time that permission was requested to make entry therefrom, and a pretence made of extending a one hundred foot reservation around and south of this Indian School Reservation. The Chilocco Indian School Reservation is south of the south line of the State of Kansas, which was declared to be the north boundary of the country opened to settlement, and is within the land district assigned to the land office at Perry.

In Brady *v.* Williams, that portion of the decision in Cagle *v.* Mendenhall which assumes that the unlawfulness of the entry upon Indian Reservations in the eastern part of the Outlet is by virtue of an order of the Secretary of the Interior and the Secretary of War severely criticised, and the Honorable Secretary decides that the Secretary of the Interior had no authority to prescribe new rules and regulations after the promulgation of the Proclamation of the President. The Department has always refused to review or re-consider the doctrine of the case of Welch *v.* Butler, and we know of no case wherein the question as to the application of the Act of Congress and the Proclamation of the President with reference to the right to enter from the Chilocco Indian School Reservation has ever been referred to or discussed.

Even in case of doubt and uncertainty as to whether or not the Act of Congress and the Proclamation of the President would permit persons to go upon the Indian Reservations and make a run for homesteads from the western boundary thereof, we think the contemporaneous construction of the Act and the Proclamation, and the results of that construction, are fully sufficient to impel the court to the decision which would be in accord with the rights of the parties acquired by reason of compliance with the original construction of the law. We deny that there is any uncertainty as to the meaning and construction of the Act and the

Proclamation. Pursuant to the law, as declared in Smith v. Townsend, that the line of prohibition extended around the entire tract of country referred to and dealt with in opening the lands to settlement, an entire tract of country was at all times dealt with and referred to in opening the lands in the Cherokee Outlet. And this entire tract of country, specifically and unmistakably described by metes and bounds, is always referred to both in the Act and the Proclamation, when such Act and Proclamation have reference to the qualification of intending settlers, or the point from which they must start upon the race for lands. Section 14 of the Act approved March 2, 1889, is as follows:

"The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the 96th degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President and by him to Congress at its next session, and to the council or councils, nation or nations, tribe or tribes, agreeing to the same, for ratification, and for this purpose the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be immediately available: *Provided*, that said commission is further authorized to submit to the Cherokee Nation the proposition that said nation shall cede to the United States, in the manner and with the effect aforesaid, all the rights of said nation in said lands, upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January 19, 1889, and ratified by the present Congress; and if said Cherokee Nation shall accept, and by act of its legislative authority duly passed, ratify the same, said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the

President is authorized as soon thereafter as he may deem advisable, by proclamation to open said lands to settlement, in the same manner and to the same effect as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto."

It will be noticed that this act makes no provision for the right of entry upon any of these lands, merely because the same may not be acquired by the United States under treaty with the Indians. That this prohibition is recognized and carried out through all subsequent laws, documents and proceedings, is evidenced by the Act of 1893 and the Proclamation of the President. The Proclamation recites that the Cherokees have ceded to the United States and relinquished and surrendered all their title, claim and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth degree of west longitude, on the north by the State of Kansas, on the east by the 96th degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation. After referring to certain allotments to resident Cherokees, the Proclamation refers to the provision for the completion of title of the United States to certain portions or parcels of land within this entire tract, and, after enumerating certain reservations, authorizes the President of the United States, at any time within six months after the approval of the act and the acceptance of the same by the Cherokee Nation, by proclamation to open to settlement any or all of the lands not alloted or reserved.

We suggest again that there is nothing in the Act of 1893 that gives permission to enter upon any of the lands, whether

they should be opened or not, and the Act refers to all the lands west of the 96th degree, pursuant to the Act of 1889, and reiterates the prohibition as follows:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this Act for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for opening said lands."

The President was not authorized to prohibit anyone from entering upon any land, or any portion of the lands referred to in these Acts of Congress, but was authorized to open to settlement any or all of the lands. Treaties, allotments and surveys were not completed for some of the lands within this general tract, and therefore the lands were not opened to settlement, but the law with reference to entry upon the lands described by metes and bounds, as aforesaid, remained the same, and the President's Proclamation contains no prohibition, but only permission to enter upon certain described tracts. After fixing the county seats of the various counties within that portion of the territory opened to settlement, the President enumerates all tracts and parcels of land which are reserved from the opening, and here we think a very simple rule can be applied, to test the entire contention of the defendant in error. If these tracts and parcels of land reserved from settlement were not within the tract of country upon which entry was prohibited and that entire tract referred to and dealt with in the Act of Congress and the Proclamation of the Presi-

dent, we leave the question for its own answer, Why were they reserved from it? If they were not within, we see no reason for taking them out.

That portion of the proclamation with reference to permission to enter upon any portion of the tract of country referred to is as follows:

"A strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation is hereby temporarily set apart for the following purposes and uses, viz: said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet shall be opened to occupancy in advance of the day and hour named for opening said country, by persons expecting and intending to make settlement pursuant to this proclamation. Said occupancy shall not be regarded as a trespass or in violation of this proclamation or the law under which it is made, nor shall any settlement rights be gained thereby."

This portion of the Proclamation, we think, does not apply to any tract of country except that tract of country described by metes and bounds in the Acts of Congress, and from which general tract these reservations had been made from settlement.

There were three general portions of this entire tract being dealt with, that were being opened to occupancy, with the exception of Indian allotments, school reservations, etc., which were the residue or western portion of the Cherokee Outlet not before conveyed to friendly Indians, the Ponca Indian Reservation and the Tonkawa Indian Reservation. These lands were acquired by separate treaties, and if the President had not been dealing with one entire tract, he doubtless would have referred to these three several tracts. At any rate, the only permission that is anywhere found, granting anyone the right to enter upon any portion of the

lands west of the 96th degree, and south of the south line of Kansas, etc., is contained in this part of the proclamation. All else is prohibition.

Again, this part of the proclamation, with the apparent intention of making all things positive and certain, declares that the inner boundary of this one hundred foot reservation or permission shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet. But one country has ever been known, or ever will be known, as the Cherokee Outlet, and that is the lands west of the 96th degree, which were ceded to the Cherokee Indians for the purpose of an outlet west. Ever since such treaty or grant, this strip of country has been known and called the Cherokee Outlet, and is still known as and called the Cherokee Outlet, and we suggest will always be known by that name, regardless of who may become the owner of all or any portion thereof, or what municipality may exercise government and control over it. The name Cherokee Outlet is as familiar, and in as common use, to-day, as it ever was, although no one thinks of suggesting that the Cherokee Indians retain any title therein.

A portion of the Cherokee Outlet was embraced within the original Territory of Oklahoma, since which time it has been called the Cherokee Outlet, but for certainty has sometimes been referred to as "that part of the Cherokee Outlet within the Territory of Oklohoma," or the residue of the outlet not embraced in the territory as "that part of the Cherokee Outlet not embraced within the Territory of Oklahoma."

Section 9 of the Organic Act of the Territory of Oklahoma provides that:

"In addition to the jurisdiction otherwise conferred by this act, said District courts shall have and exercise exclusive original jurisdiction over all offenses against the laws of

the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma as herein defined, and in all civil cases between citizens of the United States residing in such portion of the Cherokee Outlet, or between citizens of the United States, or of any State or Territory."

United States *v.* Pridgeon, 153 U. S., 48:

"An indictment in the District Court of the United States within and for Logan County, Oklahoma Territory, and for the Indian Country attached thereto, charging the commission of the offense of horse stealing in November, 1890, and laying the venue of the offense 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan county', with a description of territory which included part of Oklahoma, and a part of the Cherokee Outlet, not in Oklahoma, and which averred the same to be 'then and there Indian country and the place then and there under the sole and exclusive jurisdiction of the United States of America,' will not be held to be fatally defective when attacked collaterally and by writ of habeas corpus."

Technically speaking, the Cherokee Outlet probably consisted of that portion of the Outlet remaining after the conveyance of certain parts to friendly Indians. It will be noticed that the President was careful to avoid any technical or strict application of his language, and therefore used the term "the country known as the Cherokee Outlet," and that definition has as definite a meaning to-day as it had then, and no citizen of the nation at all familiar with the history of the Indian Territory could possibly misunderstand the term, if used now, even after all portions of the country known as the Cherokee Outlet has ceased to be the property of or held for the use of the Cherokee Indians.

Decker *v.* A. T. & S. F. R'y Co., 3 Okla., 553.

The first subdivision of Section 10, of the Act of 1893,

27 Stats. at Large, page 640, appears to give a definition of the country "commonly called the Cherokee Outlet" that would admit of no doubt. That portion of the section is as follows:

"Section 10. That the sum of $295,736.00, payable as hereinafter provided, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay $8,300,000.00, or so much thereof as may be necessary, in addition, to pay the Cherokee Indians for all the right, title, interest and claim which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between David H. Jerome, Alfred M. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the United States, and Alias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett and Joseph Small, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indian Territory on the nineteenth day of December, 1891, bounded on the west by the one hundredth degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe Reservation, defined by Executive Order dated August 10, 1869, which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet.'"

This being the act under which lands in the Cherokee Outlet were opened to settlement, it is scarcely possible that the President and Secretary could have misunderstood the meaning of the term used by them. Again, the term "herein referred to," both in the act and the proclamation, is as comprehensive as the definition of the Cherokee Out-

let, because all the lands described in Section 10 are referred to, and the prohibition is reiterated, that no one would be permitted to enter upon any of those lands. It is immaterial whether one or more tracts within this general body of land was opened to settlement. The prohibition was not against entering upon any lands referred to in the Act and Proclamation "except such portions thereof as might be opened to settlement." It was against entering upon any lands, and permission was given to make entry in a certain way. The act gave ample authority to the President to open to settlement all the lands within the Cherokee Outlet if treaties had been completed. It is immaterial what title or interest the Cherokees hold in any or all of this tract of country. It is sufficient that it is particularly described, and entry prohibited upon any part of it, and the United States saw fit to avoid all controversy as to the ownership of the land by completing negotiations for each and every part of the land embraced within the description given in Section 10, whether the Cherokees held the whole title, or no title or interest.

It may be that the Delaware and Shawnee Indians had some interest in said tract of country, or the possibility may have existed that they had some interest. It is sufficient that said Section 10 makes provision for holding the money paid for the Cherokee Outlet until the interest of said Delaware and Shawnee Indians could be determined in the courts of the United States. The lands held in connection with the Cherokee Indian School were expressly reserved from settlement by said act, but the prohibition against entering upon the same was not modified or set aside. The President was authorized to make other reservations from settlement, but there is nothing in the act even intimating that the right to enter upon said lands was created merely because the President failed to declare them subject to

homestead entry. If the failure to declare any part of the lands subject to entry removed the prohibition against entry thereon for the purpose of making the race to other portions which were subject to homestead entry, then all reservations for schools, allotments, saline reservations, county reservations and public roads would have been subject to such occupancy, and this doctrine leads us back to the contention that was so positively and forcibly overthrown and denied in Smith *v.* Townsend: "It was evidently the intention of Congress to erect a wall around this entire tract of country."

Such was the declaration of the court under a statute that was not so definite and positive as the one under consideration. Congress, by positive language, made that plain which required the decision of the court in Smith *v.* Townsend, by prescribing the prohibited country by exact metes and bounds, and declaring that no one should enter upon any portion of that tract of country, except as permitted by the President, and we find nothing in the proclamation that can fairly be construed into permission to enter upon any portion of that tract of country, except the one hundred foot reservation around the outer boundary thereof, and the portions of the lands actually opened to homestead settlement.

We think that a portion of the decision in Cagle *v.* Mendenhall is inaccurate. A portion of that opinion seems to admit that the President intended to make a reservation of one hundred feet around the eastern portion of that part of the main body of the Cherokee Outlet opened to homestead settlement. It is altogether probable that the President and Secretary assumed that all persons knew the law with reference to the right to enter upon Indian reservations, and it was expected that the one hundred foot reservation would be used where it was lawful to use it.

One paragraph of the opinion indicates that the writer thereof understood the "Cherokee Outlet to mean that portion of the Outlet remaining after deducting Indian Reservations." These inaccuracies may be urged as weakening the decision as a matter of argument, but it still shows the construction of the law which controlled all persons except a few who defied any ruling or construction of law and rendered necessary the efforts of the departments of the Government, including the soldiers, to prevent such invasions.

The basis of the argument on behalf of the defendant in error is that the lands which had been sold to friendly Indians upon the Cherokee Outlet ceased to be a portion of the Cherokee Outlet. There is no other way in which they can construe the language of the proclamation and contend that the one hundred foot reservation was around less than the whole tract of country lying west of the 96th degree, etc. It requires but a moment's consideration to see that the proclamation cannot be so construed.

By the treaty of 1866, the United States had the right to settle friendly Indians in the Cherokee Outlet west of the 96th degree. Pursuant to this treaty, they not only settled the Osages, Kaws, Poncas, Otoes and Missourias, but they also settled the Pawnees and the Tonkawas inside the Outlet. The Pawnees were settled in pursuance of the provisions of Section 4 of the Act of April 10, 1876, 19 Stats. at Large, 28, the Nez Perces and Tonkawas pursuant to the Act of May 27, 1878, 20 Stats. at Large, 74, and the Chilocco Indian School Reservation was reserved by Executive Document dated July 12, 1884.

Assuming that the withdrawal of portions of these lands from the use and occupancy of the Cherokees denied to them the right to be thereafter included in the geographical designation or description of "the Cherokee Outlet," the

reservation of the Pawnees and Tonkawas, having been purchased by the United States and declared a part of the public domain, could not thereby have become a portion of the Cherokee Outlet. If they had ceased to be a portion of the Cherokee Outlet, there is nothing in this transaction that could again entitle them to that name. If we limit the last paragraph of that portion of the proclamation as referring to "so much of the country formerly known as the Cherokee Outlet as has not been sold or transferred by the Cherokee Indians," then we would exclude from the prohibited district these two reservations. If this contention is logical, it is a little surprising that, with all the cunning and ingenuity of those who, like the defendant in error, were disposed to resort to any means and defy any authority or power to gain an advantage in the race, did not discover their right to go upon these two reservations and settle prior to noon of September 16, 1893, or seize lands adjoining the borders thereof.

We are not aware that any difficulty has been encountered in ascertaining the meaning of the Act of Congress and the Proclamation of the President, except by such as have first departed from the plain language thereof, and indulged in speculation as to what the President probably said, or should have said. They have then presumed that the President could not have intended that a person should go to the eastern boundary of the Cherokee Outlet, from twelve to fifty miles from the valuable lands along the Arkansas River, in order to make the run. They have not troubled themselves with the presumption that the President did not intend that settlers should congregate along the middle of the main channel of the Arkansas River and remain there for several days waiting for the opening. Neither the case of Cagle *v.* Mendenhall, nor Brady *v.* Williams, deals with the question where the eastern

boundary would actually be, if it is not at the 96th degree. By the Proclamation of the President, it appears that the western boundary of the Osage Reservation is the middle of the main channel of the Arkansas River, and such is the treaty. The bed of this river is about one mile in width, and the stream, at low water, from four to eight hundred yards in width, and from five to fifteen feet deep. If the President intended that men should congregate along the western boundary of these Indian Reservations, he might have been considerate enough of human life and convenience to extend the temporary reservation at least to one bank or the other of the river.

The learned justice who delivered the opinion of the Supreme Court of the Territory of Oklahoma quotes only a portion of Section 10 of the act of 1893, not including in his quotation that portion of the section containing the description of the lands referred to in the part of the section quoted, and concludes that the "lands herein referred to" has reference to something other than the lands actually described in the act from which he is quoting. We do not think that this is a fair presentation of the language of the act, aside from the fact that the middle of a large river would be an uncomfortable place for even an Oklahoma boomer to camp temporarily, pending the opening of the homestead lands, and we might entertain another presumption with reference to the one hundred foot reservation on the western boundary or at the one hundredth degree. This reservation is from one hundred and fifty to one hundred and ninety miles from the valuable and desirable lands along the Arkansas Valley. The lands in the western portion of the Outlet were worthless, except for the grazing purposes, and probably not a single man started on the race for a homestead from the western border.

Considerable land has been taken for homesteads in the

western part of the Territory during the past two or three years, but, during the first two or three after the opening, no land was taken as homesteads in that part of the country, except lands that were watered, and that were valuable in connection with cattle ranges. It is probably fair to assume that the President had no idea of dictating to any one from what point they should run, but all must certainly agree that it was the intention of Congress, as well as of the President and of all the officers in charge of the opening, that all should have a fair and equal chance in the race. That the construction of the law by the Supreme Court of the Territory of Oklahoma would not be in accord with such a purpose is evident. This handful of men who defied the commands of the Government and evaded the vigilance of its troops, were not, and have no right to be, the pet creatures of the Government. If they be awarded the land which they claim, the wrong which results is done to every man who mingled with the throng upon the outer boundaries, because each and every one of them might have been the one to be denied his rights to a piece of land selected by a sooner who stole across the river, or who hid in the brush along its banks until the hour of the opening. These men on the border were virtually forced back from these points of advantage along the river by the bayonets of the soldiers. Certainly it was not the intention of the Government, or of any of the officers in charge of any of its departments, that this vast multitude of worthy people should be so restrained, and that the reward should be given to those only who were disposed to defy the power of the Government and to ignore its rulings and commands.

The question involved in this case was incidentally before this Court in the case of Black *v.* Jackson, October Term, 1899, 177 U. S., 349. The precise point involved

here was not directly passed upon by the Court, because it had not been disposed of or considered by the Supreme Court of the Territory. The effect of the decision, however, we think is sufficient to dispose of the case at bar. In that action, a demurrer was sustained to an answer setting up the same facts that are set forth in the amended petition of the plaintiff in error herein. The defendant refused to further plead and stood upon the answer. The cause was dismissed and proceedings in error taken to the Supreme Court of the Territory. The action of the trial court in sustaining the demurrer was upheld, and the case came before this Court on appeal. The Court held that the title to the land was involved in the action, and that the answer stated a defense; that the demurrer should have been overruled, and the defendant permitted to make proof of his allegations. The discussion of the case related only to the points which had been determined in the Supreme Court of the Territory of Oklahoma, but the overruling of the demurrer was in effect a declaration that the answer, upon its face, was sufficient. All that would remain would be the proof of the allegations of the answer and the relief resulting therefrom. If no defense was set forth in the answer, there was nothing to prove to either the Court or jury, and it became immaterial what was done or demanded with reference to a jury trial. The jury was to try the issues, and if the answer stated no defense, there was no issue for the jury, and the Court must have been held to have disposed properly of the case as presenting only an issue of law upon the demurrer.

The reservation in that case was the Chilocco Indian School Reservation, but we conceive no difference can exist between the two, except that the records of the department showed that, on the morning before the opening, the Commissioner of the General Land Office directed that a one

hundred foot reservation be placed around and south of this reservation. It can hardly be claimed, we think, that any authority existed in any department of the Government to change the act and the proclamation, and we submit that that part of the decision, in the case of Brady *v.* Williams, is a correct interpretation of the law.

All that is contended by plaintiff in error with reference to what was meant in the Act and the Proclamation by the term "the country known as the Cherokee Outlet," is conceded by the Honorable Secretary of the Interior in Brady *v.* Williams, 25 L. D., 55, and we think that all the contention on behalf of the defendant in error must reduce itself to this admission, and from that point show some excuse, if any there be, why the declaration of Congress and the President of the United States, positively fixing the probibitory line "around the entire tract of country known as the Cherokee Outlet," and describing that country as being bounded on the east by the ninety-sixth degree of west longitude, on the north by the State of Kansas, etc., should be overthrown on the 24th of July, 1897, by the declaration of the Honorable Secretary of the Interior that the Act and Proclamation "did not apply to the whole of said outlet." That portion of the case last cited, with reference to this point is as follows:

"The prohibitory provisions of the statute opening to settlement the lands known as the 'Cherokee Outlet,' and the President's proclamation thereunder, did not apply to the whole of said Outlet, but only to such portion thereof as should be declared open to settlement under said proclamation, and hence are not applicable to Indian reservations within said Outlet excluded from settlement, but adjacent to the lands opened under said proclamation."

It has been said that "'Thou shalt', and 'thou shalt not', is carved into the very nature of things." How the com-

mand of Congress and of the President that "Thou shalt not enter upon any portion of the tract of country known as the Cherokee Outlet, except a one hundred foot reservation around and immediately within the outer boundaries thereof" can co-exist with the declaration of the Secretary that "Thou shalt be permitted to enter upon all portions of the country known as the Cherokee Outlet, except such portions as are actually opened to homestead settlement," we submit, is more than can be reconciled. A comparison of the grounds of the two conflicting constructions, we think, is sufficient to warrant the action of the President, the Secretary of the Interior, the Secretary of War, the Commissioner of the General Land Office, the agents of the Government, as well as its soldiers, the lawyers of the country and 150,000 intelligent and law-abiding people, in holding that the command of Congress and the warning of the President, which was then before the settlers for their guidance, constituted the enduring truth carved into the nature of the contest for homes in this new country.

Whatever has been said prior to the language last quoted has been reduced and enforced by argument and consideration until the Honorable Secretary was brought to the ultimate proposition on behalf of those who defied the Act of Congress and the Proclamation of the President, and forced to admit that the language of Congress and of the President with reference to what constituted the country known as the Cherokee Outlet, referred to all that country. If this be conceded, we have no disposition to offer argument to convince the Court that the command ought to be respected, at least in favor of those who acted upon it and who have expended their labor and substance through all these years in improving their homes, and in the contention that Congress and the President meant what they said; that, when they were forced to remain upon the outer boundaries of

this country by the bayonets of the soldiers of the United States, they were not being unfairly held back by such force, while others with less regard for the laws and commands of the Government were gaining an advantage over them which was inequitable and unjust to the last degree.

There is nowhere in the Act of Congress or in the warning of the President in the Proclamation, any language that can be construed into referring to what was prohibited, that does not refer positively and specifically to the entire tract of country known as the Cherokee Outlet, and, in addition thereto, they render certainty more unmistakable by defining by metes and bounds what was to be understood as, and taken to be, the Cherokee Outlet for the purposes of the Act.

The contention that only the lands opened to settlement were to be considered within the prohibited district was presented to this Court in Smith *v.* Townsend, 148 U. S., 490. It is immaterial whether the reservations within the single tract of country bounded by this line of prohibition were few or many, large or small. Few were mentioned in the act opening Old Oklahoma to settlement, but they were sufficient in number and importance to give rise to the identical contention which is now again before the court.

The meaning of the act under consideration in Smith *v.* Townsend was not so clear and positive as the one under consideration in the present case, and the definiteness and certainty of the later act was doubtless induced by controversies over the previous legislation. In the case last referred to, Mr. Justice Brewer, after discussing the nature of the title held by the railroad company to its right of way, declares the nature of the title to be immaterial, and uses the following language:

" But whether this be so or not, it is enough that in the cession, in the acts of Congress, and in the proclamation of

the President the land was dealt with as an entirety, with certain metes and bounds, and it is that body of lands, thus bounded, which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead. The evident intent of Congress was, by this legislation, to put a wall around this entire territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homestead."

By the legislation under consideration in the present case, this "wall" is so definitely and certainly fixed that any one who can read can understand it, and it is a well-known fact that practically every person throughout the country, and especially in the vicinity of the lands in question, did understand it, and this general understanding and application of the law furnishes the convincing argument that its meaning was not obscure, and becomes the positive and certain meaning of the law under the rule of contemporaneous construction, even though there was positive uncertainty in the language in question.

There were hundreds of reservations in the Cherokee Outlet. Some of them amounted to no more than two acres, for the purposes of Government land offices. Others amounted to thousands of acres, and were held from settlement by reason of the rights of the Indians, and a great many, sometimes amounting to only a section or less, were reserved for the benefit of the schools and as Indian allotments. The saline reservations covered thousands of acres, and were never fully and completely granted to the Cherokees, but under the Cherokee Treaty the Government reserved the right to permit other Indians to take salt from those reservations, and to use them in common with the

Cherokees for that purpose. One of these reservations adjoins the State of Kansas on the north of the Outlet, and extends nearly four miles south, a little deeper into the Cherokee Outlet than the Chilocco School Reservation. If reserving land from homestead settlement within the Outlet placed it outside of the prohibited district, then there was no "tract of country" opened to settlement or referred to, and the admission that these principal reservations were within the country known as the Cherokee Outlet we consider virtually an admission that there is no foundation for the contention that the line of prohibition was not around all the reservations alike, or that all were alike opened to occupancy prior to the opening of the homestead lands to settlement. We file and submit with this brief a large map, showing all reservations within the Cherokee Outlet, except the reservation of sixty feet for public roads, which would, of course, connect all other reservations and make every parcel of land opened to settlement accessible, without actually going upon any of the homestead lands. Without resorting to these road reservations, almost all the homestead lands in Pawnee County might be reached by crossing over Indian reservations, "allotments." The rule that only homestead lands were within the line of prohibition leads back to the very contention that was urged in Smith *v.* Townsend. The fact that the act then under consideration, in the prohibitory clause, used the words "enter upon and occupy," furnished some shadow of excuse for the contention in that case, but the language is changed in the present act to read "enter upon or occupy," so that is made certain by the language of the act which required a decision of the court to render positive in the former act.

All the precautions of the Government in the location of booths and the issuance of certificates, and the requirements in that regard, as well as detailing soldiers to guard the

borders of the country, would have been wholly useless, if there was not an outer boundary to some entire tract of country to be guarded and protected. All the soldiers under the command of the United States at the time could not have guarded all the borders to all these reservations and pieces of country opened to settlement and occupancy, if persons had the right to collect upon the borders of any piece of homestead land that they might desire.

Fairness and exact justice between all the contestants for homes was the first consideration of Congress and the President. The object was practically accomplished by the construction of the law which prevailed for more than three years. It is believed there can be neither reason or justice in the new contention.

Respectfully submitted,

S. H. HARRIS,
Attorney for Appellant.
J. J. DARLINGTON,
Of Counsel.

0011